

GERARD BOR, a Minor by WILLIAM COOPER, Esq; his Guardian, --- Appellant.

JACOB BOR, Esq; HELENA MARIA BOR, MARY BOR, Sir THOMAS TAYLOR. Bart. WILLIAM LONGFIELD, BRIDGES BALDWIN, BOLEYN } Respondents.
WHITNEY, and WILLIAM WILLIAMS,

The Appellant's CASE.

MARGARET BOR, was seized in Fee of the Towns and Lands of Ballawly, and Edmondstown, in the County of Dublin, of one House in Back Lane in Dublin, of ten Acres of Land, in the Fields and County of Wicklow, of one House in Michael's Lane, in the City of Dublin, called the Tun Tavern, of a large Piece of waste Ground fronting the said Lane on which Bor Court has been since built, of one House in School House Lane, with several waste Plots joining thereto, of the Town and Lands of Pelletstown, in the County of Dublin, and of six Houses in Bor Court.---She was also seized or possessed of one House in Great Butter Lane, and three Houses in Kevan's Street, in the County of Dublin, by Virtue of several Leases for Lives, renewable for ever, or for long terms of Years, and having three Sons, to wit, Christian Bor, her eldest Son, Jacob Bor, and Benjamin Bor, she duly made and published her last Will and Testament in Writing, which bears Date the 30th Day of August, 1690. She devised the Lands of Ballawly and Edmondstown, the House in Back Lane, and the ten Acres of Land in the County of Wicklow, to Christian Bor for Life, Remainder to his first, and other Sons successively in Tail-Male, Remainder to Jacob, the second Son for Life, Remainder to his first and other Sons in Tail-Male, Remainder to Benjamin Bor, the third Son for Life, Remainder to his first and other Sons in Tail-Male, and she devised all her Estate and Interest in the House and Ground in Butter Lane, and the three Houses in Kevan's Street, to the said Christian Bor.---She devised the House and Ground in Michael's Lane, and School House Lane, and the Houses and Land in Bor Court to her second Son Jacob for his Life, Remainder to his first, and other Sons in Tail-Male, Remainder to Benjamin the youngest Son for Life, Remainder to his first, and other Sons in Tail-Male, Remainder to Christian the eldest Son for Life, Remainder to his first, and every other Son in Tail-Male.---And she devised the Town and Lands of Pelletstown to Benjamin the third Son for Life, Remainder to his first and other Sons in Tail-Male, Remainder to Jacob for Life, Remainder to his first, and other Sons in Tail-Male, Remainder to Christian and his Sons in the like Manner.---By her Will she gave a Power to Christian to charge the Lands devised to him with a Jointure for any Wife he should marry, not exceeding £.200 a Year, and it was further provided by the said Will, that the Sons of the said Testatrix should when in Possession have Power to charge the Estates to them severally devised, with any Sums not exceeding a Moiety of the Value for the Portions and Maintenances of younger Children, to be distributed in such Manner and Proportion as they should by Will or other Writing Appoint.

Margaret Bor, died in 1694, and her Sons became seized and possessed of the several Freehold and Leasehold Interests devised to them by her Will.

Christian Bor the eldest Son in the Year 1717, intermarried with Helena Maria Longfield, but previous to the Marriage, and in Consideration thereof, and of a Marriage Portion of £.1800 by Deeds of Lease and Release, bearing Date respectively the first and second Days of July 1717, he conveyed the Estates devised to him by his Mother's Will to William Longfield, and Richard Nutley, and their Heirs. To the Use of himself for Life, and after his Death to the Intent that the said Helena Maria, might receive out of the Lands of Ballawly, £.200 by the Year for her Jointure, in full of all Dower, and upon further Trust, to raise £.2000 for the Portions of the Daughters, or younger Children of the said Marriage, to be equally divided amongst them, and subject to such Jointure and Portions, to the Use of the first, and other Sons of the said Marriage, successively in Tail-Male.

Jacob and Benjamin, the two younger Sons of Margaret Bor, died without Issue, and unmarried, and upon their Deaths, the Remainder limited to Christian of the Estates, devised by Margaret Bor to her younger Sons took Place, whereby he came into the actual Possession of the Premises in Michael's Lane, School House Lane, and Bor Court, and of the Lands of Pelletstown.

Christian Bor, by the Death of an Uncle, inherited the Lands of Ballynurry, and Kilcoole in the County of Carlow, which were about £.100 per Annum. He had Issue by the said Helena Maria four Sons, to wit, John his eldest Son, Gerard the Appellant's Father his second Son, the Respondent Jacob his third Son, and William his fourth and youngest Son.---He duly made and published his last Will and Testament in Writing, which bears Date the 8th Day of June 1733, and thereby he confirmed the Marriage Settlement, and the Charge of £.2000 therein mentioned for younger Children, which he bequeathed to his three younger Sons, Gerard, Jacob, and William, Share, and share alike, and he devised to his Brother In-law Arthur Baldwin, and Editba his Wife, and their Heirs, the Lands of Ballynurry and Kilcoole, the Lands of Pelletstown, and Mill, and also his Houses, Lands, Tenements and Hereditaments in Michael's Lane, School House Lane, and Bor Court, to the Uses, and upon the Trusts following, to wit, as to the said Lands of Ballynurry and Kilcoole, to the Use of the said Gerard, the Appellant's Father for Life, Remainder to his first and every other Son in Tail-Male, Remainder to the Respondent Jacob for Life, Remainder to his first and every other Son in Tail-Male, Remainder to William for Life, Remainder to his first and other Sons in Tail-Male, Remainder to John his eldest Son for Life, Remainder to his first and every other Son in Tail-Male; and as to the Lands of Pelletstown, and the Houses, Lands, Tenements, and Hereditaments in Michael's Lane, School House Lane, and Bor Court, to the Use of his Sons Jacob and William for their respective natural Lives; and as to the Respondent Jacob's Moiety thereof after the said Respondent's Death to the Use of his first and other Sons successively in Tail-Male, Remainder to William for Life, Remainder to his first and other Sons in Tail-Male, Remainder to John the eldest Son for Life, and to his Sons in Tail-Male, Remainder to the Appellant's Father for Life, and to his Sons in Tail-Male; and as to the other Moiety, after the Death of William, to the Use of his first and other Sons in Tail-Male, Remainder to John for Life, and to his Sons in Tail-Male, Remainder to the Appellant's Father for Life, and to his Sons in Tail-Male, Remainder to the Respondent Jacob for Life, and to his Sons in Tail-Male.

By this Will it is provided by the Testator, that in Case his Title and Estate in the said Lands of Pelletstown, and the Houses and Premises in Michael's Lane, School House Lane, and Bor Court, so stood that he could not leave and devise the same in such Manner, and to such Uses as by his said Will he intended, that in such Case the Share and Part of the said £2000 mentioned in the said Settlement, and by his said Will devised to the Appellant's Father

Father, should not go to him; but that the same should be equally divided between his Sons, the Respondent *Jacob* and *William*, Share and Share alike, and by this Will he appointed the said *Helena Maria* Guardian of his said four Sons, and sole Executrix of his Will.

Christian Bor died on the 11th of *June*, 1733; leaving his four Sons then under Age.---*Helena Maria* proved the Will, and took upon herself the Guardianship of the Children.

John, the eldest Son of *Christian*, attained his Age of 21 Years in *September* 1739; he took Possession of all the Estates devised by his Grandmother to his Father for Life, which were of the yearly Value of about £. 600--He likewise insisted upon his Right to the Lands of *Pelletstown*, and the Premises in *Michael's Lane*, *School House Lane*, and *Bor Court*, under his Grandmother's Will, notwithstanding the Disposition made by his Father in Favour of his younger Brothers. The Consequence of this would have been that *Gerard* must either have given up the Estate for Life devised to him in the Lands of *Ballynurry*, and *Kilcoole*, or let his Third of the £.2000 go to his Brothers *Jacob* and *William*. For by *Gerard's* insisting to retain his third of the £.2000 he could no Way affect the Remainders in the said Lands devised to his first, and every other Son, &c. That the Testator did not mean.

Gerard's third of the £.2000 was not given by Way of Penalty upon *Gerard* for the Loss of *Pelletstown*, nor by Way of Satisfaction for *Pelletstown*, &c. to the younger Children, and their Families; but was given as original Portions to *Jacob* and *William*, in Case *Pelletstown* could not pass by his Will.--The Testator could not mean this as a Penalty, or Condition on *Gerard*, because he knew if he had not Power to devise *Pelletstown*, &c.--It arose from its being settled on *John*, in Tail, so that by suffering a common Recovery, *John* might do what he pleased with it, and it was not in *Gerard's* Power to prevent it.

The Testator could not mean the 666l. 13s. 4d. as a Compensation for, or in Lieu of the Devise of *Pelletstown*, &c. not only as being greatly inferior in Value, but as it is directed to go in a different Manner.

The Testator's Intention is plain, he meant to make an alternate Disposition, as the Case should come out in respect of his Title to *Pelletstown*, &c. If he had Power to devise it, the Provision he makes for his three younger Sons is of one Kind. If he had no Power to devise it, he varies the Provision, as it appeared upon his Death that he had no Title to devise *Pelletstown*, &c.--The other Part of the alternative is become his Will, i. e. a Condition expressly annexed to the Estate for Life, devised to *Gerard* in *Ballynurry*, and *Kilcoole*, that he would give up 666l. 13s. 4d. to his Brothers *Jacob* and *William*, and his Will stood then just as if he had never devised *Pelletstown* at all, and it is apprehended that if the Matter had been litigated when all the Sons were alive, and before any Agreement with *John*, no other Construction could have been made, nor any other Decree than to enforce the Condition upon *Gerard*, to give up 666l. 13s. 4d. or lose his Estate for Life, in about 100£. a Year.

But *Helena Maria Bor*, the Mother being aware of this, and desirous to purchase from *John*, *Pelletstown*, &c. for her Sons *Jacob* and *William*, and thereby to secure to her Son *Gerard* his 666l. 13s. 4d. She treated with *John*, and upon such Treaty he came to an Agreement, by Deed dated the 27th of *March*, 1740; in Consideration of 900£. paid him by her, to confirm the Title of his Brothers to that Estate, according to the Limitations in his Father's Will, and covenanted to suffer Recoveries thereof, which 900£. was actually paid. He levied Fines of the whole Estates which were devised by his Grandmother's Will, and he suffered Recoveries of all that Part which had been devised immediately to his Father; but did not suffer Recoveries of the Lands of *Pelletstown*, or the Houses in *Michael's Lane*, *School House Lane*, and *Bor Court*; But he made ample Amends to the Respondent *Jacob*, and his Issue Male, for his not having suffered such Recoveries by his Will, which bears Date the 10th of *October*, 1741. He devised to *Boyleyn Whitney*, and *William Williams*, and their Heirs, all his real Estate to the Use of the Respondent *Jacob* for Life, Remainder to his first, and every other Son in Tail-Male, and appointed his Mother, the Respondent *Helena Maria*, sole Executrix thereof, and died without Issue, after whose Death the said *Helena Maria*, proved the said Will, and took upon her the Execution thereof.

The Appellant's Father attained his Age of 21 Years in 1741, and being, by the Will of his Brother *John*, disinherited of the Estates originally devised to his Father, and the Respondent *Jacob* being so amply provided for, by the Will of his Brother, he thought himself intitled to take the Benefit of his legal Right to *Pelletstown*, and the other Estates, of which no Recovery had been suffered, and to consider the Devise made by *John*, as an ample Compensation to the Respondent *Jacob* for the Provision, which *John* had covenanted to make good.

Helena Maria Bor, had got into Possession of the the Lands of *Pelletstown*, and the Houses depending upon the same Title, as Guardian to the Respondent *Jacob* and *William*, and refused to let the Appellant's Father into the Possession thereof, whereupon he, in *September* 1742, exhibited his Bill in the Court of Chancery in *Ireland*, against the Respondent *Jacob*, and others, and thereby claimed the Lands of *Pelletstown*, and the Premises in *Michael's Lane*, *School House Lane*, and *Bor Court*, under the Will of his Grandmother, and prayed to be decreed to the same, and soon after got the Possession thereof, without Controversy.

William Bor, the youngest Son, died in the Year 1744, intestate, and without Issue, and Administration of his Goods and Chattles was granted to the said *Helena Maria Bor*, his Mother, and then the Family stood thus circumstanced: The Appellant's Father, who was now the Representative of the Family, was in Possession of *Ballynurry* and *Kilcoole*, the *Pelletstown* Estate, and the Premises in *Michael's Lane*, *School House Lane*, and *Bor Court*, making together about 400l. a Year, and the Respondent, *Jacob*, the younger Son was in Possession of all the rest of the Estates of the Family, amounting to 600l. a Year.

November 1744

In *November* 1744, the Respondent *Jacob*, filed his Bill in the Court of Chancery in *Ireland*, against the Appellant's Father, and against *Helena Maria Bor*, *William Longfield*, *Boyleyn Whitney*, *Robert Baldwin*, Son and Heir of *Arthur Baldwin*, and *Editha* his Wife, and *William Williams*, and amongst other Things insisted, by his Bill, that in Case the Appellant's Father should appear to be entitled under the Will of *Margaret Bor* to *Pelletstown*, or any of the Premises devised to the Respondent *Jacob* by his Father, that then by the express Words of his Father's Will, he was not intitled to any Part of the 2000l. but that the Respondent *Jacob*, was in that Case intitled to 1000l. and to be reimbursed out of the Lands of *Ballynurry* and *Kilcoole*, the Value of such Part of the said Lands of *Pelletstown*, as should be evicted by the Appellant's Father.

17 Dec. 1744.

19 Jan. 1744.

Helena Maria Bor, put in her Answer to the said Bill, and the Appellant's Father put in his Answer to it, and thereby, among other Things, insisted that he was as one of the said *Christian's* youngest Children, intitled to one Third of the said 2000l. provided for the younger Children by the Settlement, and to a distributive Share of *William's* Proportion of it, and admitted he refused to make the Respondent *Jacob* any Satisfaction for the Lands of *Pelletstown*, or Houses in *Michael's Lane*, *School House Lane*, and *Bor Court*, out of the Lands of *Ballynurry* and *Kilcoole*, wherein he had only an Estate for Life, being advised that no such Satisfaction was expressed or intended to be made by the said *Christian's* Will, who therein declares in Case he was not impowered to devise *Pelletstown*, or the other Premises for the Use of the Respondent *Jacob*, and said *William*, that the Appellant's Father should have no Share of the said 2000l. and thereby shewed what he intended should be the Compensation to his youngest Sons, if the Devise of the *Pelletstown* Estate, was ineffectual. He likewise, by his Answer submitted to the Court, what Right *Christian Bor* had to devise the 2000l. upon his want of Title to devise *Pelletstown*, and the other Premises, and insisted on his Right to the same, under the Will of *Margaret*, and that *Christian* had no Right to devise the same, being only Tenant for Life under *Margaret's* Will.

26 Jan. 1744.

The Appellant's Father filed his Bill against the Respondent *Helena Maria*, the Administratrix of *William*, and against the Respondents *Jacob Bor*, *William Longfield*, *Boyleyn Whitney*, and *William Williams*, praying to be decreed to his Share of the 2000l. under the Settlement, and to a distributive Share of *William's* Proportion of

of it.——The Defendants put in their Answers, and the Respondent, *Jacob*, by his Answer, insisted on the same Points which he had set forth in his Bill.

In 1745, the Appellant's Father levied Fines, and suffered Recoveries of the Lands of *Pelletstown*, and the several Messuages and Tenements in *Michael's-Lane*, *Schoolhouse-Lane*, and *Bor-Court*, and mortgaged them to Sir *Thomas Taylor* for 3200l.——He afterwards intermarried with *Mary Burton*, and died the 25th of January 1745, intestate, leaving the said *Mary* with Child of the Appellant, who was born on, or about the 28th Day of June 1746, and Administration of the Goods and Chattles of the said Intestate, was granted to the said *Mary*.

10 Dec. 1746.

Mary, the Appellant's Mother, filed her Bill to revive the Suit commenced by her said Husband, *Gerard*, against the Respondent *Jacob*, and the other Parties aforesaid, for Recovery of his Share of the said 2000l. and for his Distributive Share of said *William Bor's* Proportion of it. And the same being revived, and at issue, the Cause came on to be heard on the 4th of August 1747, when it was decreed that it should be, and was thereby, referred to a Master to take an Account of what was due to the said *Mary* in Right of her Husband the said *Gerard*, as his Administratrix for his Proportion of the 2000l. provided for the Children of *Christian Bor*, by the Settlement in the Pleadings mentioned. And also to take an Account of what was due to her on account of *William Bor's* Proportion of the said 2000l. And by this Decree, no Direction is given to account for the Rents and Profits of the *Ballynurry* and *Kilcoole* Estate received by *Gerard* during his Life, to be set against the Demand of his third of the 2000l.

16 Jan. 1746.

The Appellant, by his Guardian, also filed a Bill to revive the Suit commenced by his said Father, against the Respondent *Jacob*, and others, for Recovery of the said Lands of *Pelletstown*, and the said Premises in *Michael's-Lane*, *School-House-Lane*, and *Bor-Court*.

1 Nov. 1747.

The Respondent, *Jacob*, exhibited a Bill of Revivor against *Mary Bor*, Administratrix of her late Husband, and Sir *Thomas Taylor*, and the Appellant, and afterwards amended the same pursuant to an Order of Court, and thereby, amongst other Things, prayed that the Cause might stand revived against the said *Mary* as Administratrix of her Husband; and that the Bill might be taken as an original Bill against the Appellant; and that the Respondent might have the Benefit of the several Pleadings, Proofs and Proceedings in the former Cause, on the hearing of this Cause; and that the Appellant might release all Claim to *Pelletstown*, and the other Premises devised for the said *Jacob's* Use by his Father's Will; or that the said *Mary* might not be intitled to any Part of the said 2000l. but that it might be distributed according to the Provision in the said Will; and that the said *Jacob* might be recompensed for such Part of *Pelletstown*, and the said other Premises to which the Appellant should appear to be intitled out of *Ballynurry*, and the other Lands which the Appellant enjoyed under the same Will.

10 June, 1748.

The Appellant, by *William Cooper*, his Guardian, put in his Answer, and therein, among other Things, insisted that *Christian Bor*, being Tenant for Life, could not alter the Limitations in the Will of *Margaret Bor*; and that *John Bor* not having suffered a Recovery of *Pelletstown*, or the Houses in *Michael's-Lane*, *Schoolhouse-Lane*, or *Bor-Court*, the Remainder to the Appellant's Father was not barred; and therefore that those Lands did not pass by the Will of *John Bor*, by whose Death, without Issue, the Appellant's Father became intitled to the said Estates under the Limitation in the Will of *Margaret Bor*; and that the Appellant, upon his Father's Death, became intitled thereto, and to the Lands of *Ballynurry* and *Kilcoole*, of which his said Father had been bare Tenant for Life, and submitted to the Court whether the said *Jacob* was intitled to any Part of the Relief sought by the Bill against the Appellant.

Mary, the Appellant's Mother, put in her Answer to the said Bill, and therein submitted to the Court, whether the said *Jacob* was intitled to any Part of the Relief sought by his Bill against her.

The other Defendants put in their Answers to the said Bill, and the Cause was revived against the said *Mary* the Administratrix.

The Cause afterwards abated by the Death of *Robert Baldwin*, the Son and Heir of *Arthur Baldwin*, and *Editba* his Wife; and was revived against *Bridges Baldwin*, Heir at Law of the said *Robert Baldwin*; and against *William Longfield*, Heir at Law of the said *Editba*.

22 May, 1750.

The Master having made his Report in the Respondent *Mary Bor's* Cause, and thereby reported some Points specially, the said *Mary Bor*, and *Helena Maria Bor*, severally took Exceptions thereto, and the Cause coming on to be heard on the said Report, special Points, Exceptions and Merits, on the 22d of May 1750, it was decreed, that the said *Mary* was intitled to, and should have and recover, the Sums of 1323l. 17s. 5d. $\frac{1}{2}$, reported due to her for her Husband's third Part of the said 2000l. and Interest, from the Death of the said *Christian Bor*, to the 15th of November 1749; and 441l. 5s. 5d. $\frac{1}{4}$ reported due to her for her Husband's Proportion of *William Bor's* distributive Share of said 2000l. and Interest for the Time aforesaid; together with the Sum of 20l. 15s. 3d. computed by the Register as the Interest of the Sum of 666l. 13s. 4d. from the said 15th of November 1749, to that Day; and the Sum of 6l. 18s. 4d. $\frac{1}{2}$ computed by him in like Manner as the Interest of the Sum of 222l. 4s. 4d. making in the Whole the Sum of 1792l. 16s. 7d. which Sum, with Interest for the same from that Day, and the Costs of the said Suit, was decreed should remain a Charge untill paid, on the Lands and Houses made liable to the Payment of the said 2000l. by the Settlement of 1717. and should be paid to the said *Mary* in six Months, or in Default thereof, that the said Lands and Houses, or a sufficient Part thereof, should be sold; and that out of the Money arising thereby, the said *Mary* might be paid her said principal Interest and Costs, and the Remainder, if any, laid out to the Uses limited of the said Estate, by the Will of the said *John Bor*.

Issue having been joined, and Publication passed, in the Respondent *Jacob Bor's* Cause, the same was heard on the 16th, 20th, 22d and 23d June 1752, and the Lord Chancellor having taken Time to consider of it, his Lordship was pleased to declare, that he would hear the Matter further spoke to by Counsel on both Sides, and accordingly the Cause was further spoke to, on the 15th and 18th of May 1753.

8 June, 1753:

His Lordship was pleased to decree, that the Appellant should have six Month's Time, after he arrives at the Age of twenty-one Years, to make his Election, whether he will abide by the Will of his Grandfather *Christian Bor*, in the Pleadings in the Cause mentioned, or not; and in case he shall elect to abide by the said Will, that in such Case, the Appellant shall, by good and sufficient Deeds and Assurances, convey to the Respondent, *Jacob Bor*, for the Term of his natural Life, with such Remainders over as are limited in and by the said *Christian Bor's* Will, concerning the same, one Moiety of such Part of the Lands of *Pelletstown*, and of the said Houses in *Michael's-Lane*, *Schoolhouse-Lane*, and *Bor-Court*, as shall remain after discharging what shall be due to the Defendant, Sir *Thomas Taylor*, upon the Mortgage in the Pleadings mentioned; and that he do, and shall also account with and pay over to the said *Jacob*, a Moiety of the Rents, Issues and Profits of the said Lands which were received, or might have been received, by the Appellant without wilful Default, from the Time of his coming into Possession thereof, Allowance being made for Payments on the Foot of the said Mortgage. And in case the Appellant shall elect not to abide by the said Will, as to the Devise of the Lands of *Pelletstown*, and the said Houses in *Michael's-Lane*, *Schoolhouse-Lane*, and *Bor-Court*, and the third Part of the 2000l. therein mentioned: That he shall in like Manner convey to the said *Jacob*, so much of the Lands of *Ballynurry* and *Kilcoole* devised to the Appellant's Father, with Remainder to the Appellant, as shall be equal to such Moiety of the said Lands of *Pelletstown*, and Houses in *Michael's-Lane*, *Schoolhouse-Lane*, and *Bor-Court*, and such Moiety of the Rents, Issues and Profits thereof as aforesaid; and also to a Moiety of one third Part of the said 2000l. or

so much thereof as shall at any Time come to the Hands of the Appellant. And it was further decreed, that untill such Time as the Appellant shall attain his full Age of twenty-one Years he shall receive the Rents, Issues and Profits of the said Lands of *Ballynunry*, or of the said Moiety of *Pelletstown*, and of the said Houses in *Michael's-Lane*, *Schoolhouse-Lane*, and *Bor-Court*, at the Election of his Guardian or Guardians, for the Time being, without Prejudice, and subject to the Order of the Court: And that during the said Time the Respondent, *Jacob*, shall receive the Rents, Issues and Profits of the other Lands without Prejudice, and subject to the Order of the Court. And it was further decreed, that it should be, and it was thereby, referred to Doctor *Stopford*, one of the Masters of the said Court, to take an Account of the Rents, Issues and Profits of the said Lands of *Pelletstown*, and Houses in *Michael's-Lane*, *Schoolhouse-Lane*, and *Bor-Court*; and of the Lands of *Ballynunry* and *Kilcoole*, which the Appellant, or his Father respectively received, or might, or could without wilful Default have received, from the Time they respectively came into Possession thereof. And in Case the Respondent, *Mary*, shall not, as Administratrix of the Appellant's Father, admit Assets in her Hands that it should be, and was thereby, referred to the said Master, to take an Account of the Assets of the Appellant's Father, which came to the Hands of the said *Mary*, his Administratrix, the amount and Value thereof, and how the same was disposed of, on which several Accounts, all just Allowances, were to be made, with proper Powers to the Master to examine Witnesses, and the Parties on personal Interrogatories, and Liberty to resort to the Court for further Direction.

The Appellant thinks himself aggrieved by this Decree, and has appealed therefrom to the House of Lords, and humbly hopes the same shall be reversed, for the following, among other,

R E A S O N S.

- I. For that *John Bor* has for valuable Consideration covenanted to make good the Devise of *Pelletstown*, &c. The Appellant or his Father take nothing under *John*, but the Respondent has all the real Assets of *John*, much more than sufficient to make Satisfaction for his Breach of Covenant.
- II. For that the Question is determined by the Decree in the Cause in which the Appellant's Father was originally Plaintiff, afterwards Revived by *Mary Bor*, the Appellant's Mother, by which *Gerard's* Third of the 2000 *l.* is decreed to his Administratrix, and no Account directed of the Profits he received, during his Life, of *Ballynunry* and *Kilcoole*.
- III. For that the Testator's Intention must be the Rule to govern in this Case, which Intention, though not expressed in precise Words, may by Sound, Construction, and Inference, be implied as certainly as if it was expressed; therefore where a Testator, making Provisions for the different Branches of his Family, gives a Fee Simple Estate to one, and a settled Estate to another, plainly imagining that he has Power so to do, a tacit Condition is implied to be annexed to the Devise of the Fee Simple Estate, that the Devisee shall permit the settled Estate to go according to the Will; and if in that respect he should disappoint the Will, what is Devised to him should go to the Person so disappointed, it being presumed if the Testator, who is making Provisions for his Family, had known his Defect of Power to devise the settled Estate, he would have provided, out of the Estate in his Power, for that Branch of his Family which was not intitled to the settled Estate. And have declared that no Person should enjoy a Legacy or Devise who controverted his Power as to any Benefit given to another. But in this Case *John* the eldest Son, upon the Death of the Testator, his Father was Tenant in Tail of the Lands of *Pelletstown*, &c. and nothing is Devised to him by the Will, therefore the Will could impose no Condition upon him. He might by a common Recovery have made these Lands absolutely his own, and barred the Title of every Object of the Testator's Bounty, and so long as *John* had Issue-Male, they could not possibly come to any Devisee in the Will. Therefore to bring the Condition home to *Gerard*, who is a Devisee under the Will, the Respondent must presume this to be the Intention of the Will. That if the Testator had known he had no Power to devise *Pelletstown*, he would, to secure his Devise thereof, have expressly declared, that if by the Death of *John* without Issue, and without suffering a common Recovery, and without disposing of *Pelletstown*, it should come to *Gerard* either under the Entail, or as Heir to *John*; and *Gerard* should not dispose of it, and it should come to his Issue-Male, either under the Entail, or by Descent, that then, at any Distance of Time, such Issue-Male should make good the Devise, or forfeit *Ballynunry* and *Kilcoole*; but sure it could never enter into any Man's Head to make so extravagant Nugatory, and remote a Condition, to effectuate a present Disposition for the Maintenance of younger Children. And *Pelletstown*, &c. might never come, in any shape, to any Issue-Male of *Gerard*, if it did, it might not come in Centuries. It might not come till Ages after they had suffered Recoveries, barred the Entail created by *Christian's* Will, and sold *Ballynunry* and *Kilcoole*, if such a Condition never was expressed, it would be going a great way in the Construction of Men's Wills to presume it. But the Testator, had he thought of providing for the Event of *John's* dying without Issue-Male, would have considered what might then be the State of his Family, and never would have obliged his disinherited Heir to make good a Devise to a younger Branch, which had got the Bulk of his Estate.
- IV. For that there is no room to imply what the Testator would have done if he had known his Defect of Power to devise *Pelletstown*, &c. because he has spoke for himself, he has declared his own Mind, suspecting his Title, he expressly puts the Case, and provides for that Event; he knew the Objection could only come from *John* his eldest Son, and if his Devise of *Pelletstown*, &c. was liable to that Objection to make the Provision for his three younger Sons more equal, he gives *Gerard's* Share of the 2000 *l.* to the other two, and makes it good by devising to him for Life 100 *l.* a Year, but lays no Charge upon the Remainder limited to his Issue-Male.
- V. For that the Will gives either *Pelletstown*, &c. to the Devisees thereof, or if the Title thereto is evicted, one Third of the 2000 *l.* in Lieu thereof; but the Decree gives a Satisfaction both for the Lands of *Pelletstown*, &c. and the Share of the 2000 *l.* that is both for the Thing originally devised, and what was devised in Lieu thereof, if it could not be enjoyed, tho' the Testator only gives either the one or the other, and the Decree gives a Satisfaction for the whole of the said Third of the 2000 *l.* against the Remainder entailed upon the Appellant, tho' the said Third goes as Part of his Father's personal Estate to *Mary Bor*, his Administratrix, and tho' *Gerard* received more from the Rents, and Profits of the devised Lands during his Life, nay the Decree gives no Relief over against the Assets of *John*, who had for valuable Consideration covenanted in Effect, to make good this Third to *Gerard*, and also to make good *Pelletstown* to the Respondent, &c.

W. MURRAY.

C. PRATT.